Dimitra Papadopoulou Klamaris

Professor of Civil Law

Athens University School of Law

Post mortem artificial fertilization and surrogacy in practice

Outline

I. Postmortem artificial fertilization

II. The use of a gestational surrogacy by a single male

III. Presentation of statistical data

The post-graduate studies programme of the University of Athens included topics pertinent to artificial fertilization during the academic year 1992-1993 under the supervision of Professor George Koumandos, Thanassis Papachristos and myself, just appointed lecturer at the time.

Twenty two (22) years after teaching the subject and, most importantly, thirteen (13) years after the passing of Law 3089, the focus of interest concerning medically assisted reproduction has shifted, in my opinion, primarily towards sociology issues and mainly issues related to international private law.

I shall endeavour a brief appraisal of two most disputed institutions in practice, namely post-mortem fertilization and gestational surrogacy.

I. In what concerns post-mortem artificial fertilization there exist, to the best of my knowledge, two court decisions, published in legal journals.

The first case went to court as a case of non-contentious jurisdiction[1], when the widow of a deceased man asked within the time period provided for by the law (six months after her husband's death but within two years since the time of death) that she be granted permission to use her husband's sperm cryopreserved when he was alive so that she could have a child after his death.

The court ruled that the requirements necessary for the realisation of post-mortem fertilization applied, even though, as it came out from the specific

[1] Athens Court of First Instance 5146/2007 Efarmoges Astikou Dikeou 2010, 940.

rationale following the court judgement, the consent of the man for a post-mortem artificial fertilization had been granted in his holographic will, which was published after his death.

However, in accordance with the due criticism the above court decision[2] was faced with, the desire of the testator to have his cryopreserved sperm used, which was expressed in his hand-written will and testament, does not meet pertinent legal requirements concerning the form of consent necessary for post-mortem artificial fertilization (1457, section 1b CC).

The court misapplied provision 1457, section 1bCC in conjunction with the later provision 7 of Law 3305/2005 and was simply based on the fact that it suffices for married couples to give consent for cryopreservation via a private document. That is, it overlooked that different kinds of consent are required for the general execution of artificial fertilization, the cryopreservation of reproductive material and the realization of post-mortem fertilization respectively. In addition, it cannot be put forward as an argument that Law 3305 modified the provision of Civil Code that defines the type of consent required on every separate occasion. Since the required consent specific to post mortem fertilization provided for under article 1457 CC was not in compliance with the type specifically dictated for it (public notarial), the legal requirements provided for were not met and permission should not have been granted to begin with. In fact it turns out that the court itself was aware of that fact (that the right type of consent required did not apply) and this is why it tried to make up for the lack of legal formality with the help of CC provision 178, including in the decision rationale that the will is not in contravention of commonly accepted principles of morality!

I think that the above effort on the part of the court need not even be commented upon (although it has been, dully, criticised)[3].

On the whole, suffice it to think that consent to p.m artificial fertilization constitutes a legal act and the provisions concerning the legal formality of legal acts are jus cogens and cannot be circumvented, even with a private agreement; it would be enough to extrapolate the rationale of the decision to a legal act under property law, that is to presume that in a holographic will there is a proposition for

[2] *Trokanas*, Efarmoges Astikou Dikeou 2010, 941 *et seq*.
[3] *Trokanas*, *op cit*, p 943.

a sale and a transfer of property. Based on what the above court decision takes for granted, it would be enough for the buyer to appear before the notary, accept and transfer!

Finally, one cannot resist the temptation to wonder, since the testator had been in such a good condition as to voluntarily donate his sperm for cryopreservation, why he did not give his consent for the post mortem artificial fertilization through a will drawn up by a notary public and instead he chose to write his own will in hand. Of course one could argue that he may as well have been unaware of the need to grant his consent via a notary. Such an argument would be more convincing and fall upon more sympathetic ears (ineffectual though it still would be in my opinion) compared to the argument claiming that the hand-written will and testament does not contravene morality principles.

According to law, both post mortem fertilization and the use of gestational surrogacy are methods which are to be applied subject to strict conditions. The civil code provisions concerning legal formality also constitute jus strictum. Any effort to interpret with leniency, with the aim of facilitating the signing of a contract etc, or any replacement of legal requirements is not permitted.

The following commented court decision is not directly related to post mortem artificial fertilization under Greek law but rather the consequences of a post mortem fertilization case which took place abroad. In particular, the Thessaloniki CoFI[4] was called upon to pass judgement on the acceptance of res judicata and validity of an alien court decision on an adoption which had been made in Russia. According to the factual part of the ruling, a woman adopted in Russia 4 children who were born at about the same time to 2 surrogate mothers (2 twin gestations) making use of her dead son's sperm, which means that she actually adopted her grandchildren.

Let it be noted that in the factual part of the ruling it is mentioned that the grandmother had tried to have the eggs fertilised with her son's sperm initially transferred in her own uterus[5].

The jus judicata of the adoption decision made in Russia was not affirmed by

[4] CoFI of Thessaloniki 7013/2013 Efarmoges Astikou Dikeou 2013, 336 commentary by *K. Pandelidou*.
[5] P. 339, column a.

the Greek court, on the grounds that the decision of the Russian court is in contravention to domestic public order (CC 33) and the petition was therefore rejected.

The decision was greeted with positive comments by my colleague Professor Pandelidou[6], who specifically analysed the necessary prerequisites for post-mortem fertilization, the use of a surrogate mother and the practice of adoption. Every single category of provisions involved had been breached in the court case above.

13 years after the introduction of law 3089/2002 and in the aftermath of an excellent study by Professor Kounougeri- Manoledaki, including an inclusive commentary on the above law, it turns out that the method of post mortem fertilization is not applied frequently after all, unless there are permission-granting court decisions that have escaped our attention or unless they are in fact executed in violation of the time limit, i.e the period of 300 days. If the latter holds true, then the MAR centres are breaking the law. The same can be said about the mother who endeavoured to bear the sperm of her own son in order to have grandchildren. In my opinion the afore-mentioned case ought to be audited by the MAR Authority.

II. Out of all the issues pertinent to the use of gestational surrogacy the most interesting one which has emerged in practice, is undoubtedly whether a single infertile male may in fact use this method in order to have a child.

Let it be noted that in theory a single woman who cannot bear a child can make use of an artificial fertilization methods (CC 1460), among which gestational surrogacy. We do not have exact data concerning the actual number of women who use this method. The case that concerned the Greek courts is well known. A single infertile man asked and was granted permission by the court to use donated sperm, donated eggs and a surrogate mother and as a result he had 2 little girls[7]. Trying to officially enter his children in the family registry he was faced with the registrar's query regarding the name of the woman to be registered as the mother. The legal Council of the State opined that the gestational surrogate

[6] *Pandelidou , op cit.*
[7] Athens CoFI 2827/2008 Nomiko Vima Hellenic Law Review 2012, 1437.

should be registered[8].

Then the father of the children married (perhaps the surrogate mother, it is not clear in the decision) and the woman asked to adopt the children of her husband. However, because of her age and in view of the progress of the case, the court rejected the petition for adoption[9].

In the meantime the Athens Court of First Instance Public Prosecutor lodged an appeal against the decision by which permission was granted to use a surrogate mother. The appeal was sustained by the Court[10] and eliminated the decision made by the Court of First Instance. Therefore the children had a mother, in accordance with the general rule concerning the establishment of motherhood, the woman used as a surrogate, but they did not have a father (since the paternity of the particular man was based on a court decision which was later eliminated as a result of the appeal lodged). The progress of this case is not known to me, nor is it of interest in the end. However, a significant role is played by whether the surrogate was married or not at the time the children were born- I think she was.[11].

The elimination of the court decision granting permission after the children had been born was discussed at length. In one sense[12], the decision of voluntary jurisdiction that granted permission can indeed be revoked following an appeal but the outcomes cannot be reversed, on the grounds of provision 779 of the Code of Civil Procedure which stipulates that "if the validity of a decision is reversed, modified, eliminated or suspended, the bona fide disbursements made by the obligee or a third party are strong and the rights gained are not to be encroached on and the same applies to the legal acts made by third parties acting in good faith based on the first decision, until the decision that revokes, modifies or eliinates the validity of the previous one comes into effect ". Expanding teleologically the scope of application of provision 779 of the CCP (: which is a provision of substantive law and explicitly mentions only outcomes relevant to property) we are thereby protecting the children born while the voluntary jurisdiction decision

[8] Legal Council of State 261/2010 Efarmoges Astikou Dikeou 2010, 1205 *et seq*., by *Papadopoulou- Klamari.*
[9] Athens One-member CoFI 431/2013 Nomiko Vima Hellenic Law Review 62 (2014) 880, commentary by *Nikolopoulos*.
[10] Athens CoA 3357/2010 Annals of Private Law 2013, 508
[11] CoA Decision, Annals of Private Law 2013, 509.
[12] *Papadopoulou-Klamari,* Annals of Private Law 2013, 549.

was still valid. Opting for this solution would mean that the children would not in fact have a mother but they would have a father (the single man). According to a second point of view[13] it would be enough to have recourse to a text overriding legislative power (ECHR article 8) to establish a rule dictating that despite the revocation of the decision the kinship of the children will remain unchanged. According to this second viewpoint the CCP 779 provision can also be used.

Professor Kounougeri-Manoledaki wondered in the journal "Medical Law and Bioethics"[14], whether Society is actually ready to accept an extended application of the CC 1458 to proportionately include single men (so that they too can have children through the method of gestational surrogacy). I suppose that most people would share her doubt, irrespective of whether they are in favour of the first or the second interpretation of the law. However, beyond that, allow me to add that in our legal system there is no known form of parenthood that excludes from the beginning, but also definitively, the establishment of motherhood as it so happens in France for instance.

According to our law a child may have an unknown mother or may have a non-established father but may establish paternity during his/her life. However, if we were to accept the use of a surrogate mother by a single man, the children to be born will always be deprived of their connection to a mother. Such an eventuality (children who would not have a mother at the time of birth in the eyes of the law and would not be able to have a mother ad infinitum, since our system does not provide for any way other than labour and the court decision to use a surrogate) is not acknowledged in accordance with our law. Could it be then that the principle of equality, invoked by proponents of the extended use of surrogacy for single males, would actually result in the offense against the family life of a child that will be born with no established motherhood at birth and with no possibility whatsoever to have a mother relationship established during their lives?

III. Given the opportunity of the conference I would like to present to you some figures which regard artificial fertilization with the use of a surrogate mother. A study carried out by P. Ravdas has been published in the Volume on family law in

[13] *Koumoutzis,* Annals of Private Law 2013, 552.
[14] Journal "Medical Law and Bioethics" Aug- Sept 2013, 23.

the 20th century.

Today I would like to present to you a statistical study carried out for 5 years by a post-graduate student who was also a district judge at the time. The study in question was her master thesis supervised by my colleague Mrs Dakorona and myself. The questionnaire was prepared by the above post-graduate student under my supervision. The master thesis of Mrs Kokkinaki was submitted to the University Faculty[15] on 5.2.2011.

All decisions made by the Athens Court of First Instance granting permission for the use of a surrogate mother provided for by Laws 3089/2002 and 3305/2005 in the five year period (2005-2009)were included in the study.

The study comprised a total number of 71 court decisions (2005: 14 decisions, 2006-14 decisions, 2007 – 17 decisions, 2008- 15 decisions and 2009 eleven decisions)[16].

In terms of procedure it is quite interesting that approximately half of the cases were heard behind closed doors. The study also comprised all relevant decisions made by the Piraeus CoFI in the years 2007-2012, a total of 19 cases.

In what concerns the women that made the petition:

Most of them (65/71 + 15/19) were married and in fact had been for several years (one had been married for 33 years) 1/71 divorced, 1/19 unmarried, 1/19 lived with a partner in registered partnership while the rest just lived with their partners without such a registered cohabitation agreement (3/71 + 2/19). The overwhelming majority were 41-45 years old (17/71 + 5/19). However there were court decisions in which age is not stated (11/71) while one petition was rejected because the petitioner was 50 years old.

Medical necessity was certified in court through a medical certificate. The diseases mentioned were mainly of a gynaecological nature but also other aetiologies (renal and heart failure, diabetes mellitus, hypertension, lung diseases, aneurysm, anorexia nervosa, prior radiation treatment, adenosarcoma) while there existed three women who had undergone kidney transplantation- one of them both

[15] *Kokkinaki*, Master Thesis, School of Law, registered in the School electronic Archive of post-graduate theses, 15.2.2011.

[16] The following fractions whose denominator is 71 allude to figures from the thesis of Mrs Kokkinaki and the fractions whose denominator is 19 concern figures of the Piraeus Court of First Instance.

kidney and pancreas- and one other had been subjected to a heart transplantation.

However, many decisions mention as grounds for medical necessity spontaneous miscarriages, numerous failed IVF efforts (in fact there were cases of 33, 12 and 14 IVF cycles mentioned in three of the women in their efforts to have a child). Some petitions regarded the bearing of a second child (3/71) and in one of these cases the first child had died.

Do prior failed attempts to have a child constitute grounds for medical necessity, one wonders. On the other hand I find this reason sincere since it could easily have been replaced by another, false but plausible cause.

Such issues can be discussed by the MAR competent Authority.

In what concerns the candidate gestational surrogate:

The overwhelming majority 39/71 and 9/19 were married women.

2 widows (2/71), (23/71 and 7/19) were single, out of whom 3 already had 2 children and one had 1 child. One was divorced with 3 children.

While many of them had already become mothers (33/71 and 8/19) of 2 (12/71 and 3/19), 3 (3/71 and 10/19) and 4 children (2/71 and

1/19) respectively.

The age of the surrogate was mainly 31-40 years old (19/71 and 10/19) while some women were far older (52 and 57 years old) and there also existed a very young one (18 years old).

Quite a few were Greek 29/71 and 4/19 but most of them were aliens of different nationalities: Albanian (6/71 and 3/19) Bulgarian (2/71 and 1/19) Moldovan (1/71) Romanian (5/71) French (1/71) British (3/71) Russian(3/71) Ukrainian (1/71) Georgian (3/71 and 4/19) Polish (4/19) Brazilian (1/71) Armenian (1/71) and American (1/71).

Special emphasis is placed on the physical and mental health of the surrogate mother as well as her suitability, attested through medical certificates.

Concerning the relationship between the gestational carrier and the social mother roughly speaking:

20/71 women were related by blood

2 were related by marriage (the gestational carrier was the husband's sister)

6/71 and 2/19 were sisters

6/71 were mothers of the women

22/71 and 9/19 were friends of the couple, 14/71 and 6/19 were professional acquaintances (usually housemaids, nurses catering for the parents of the couple that wanted a child, in fact in one case the unmarried housemaid already had a child and was nursing the very old mother of the applicant at the time. The decision mentioned that the young woman would in fact continue to work during pregnancy and after the birth of the child)!

25/71 applicants had furnished a private agreement document; 14/71 submitted a document authenticated by a notary and 22/71 furnished a document drawn up by a notary public.

In one case the agreement stipulated that the gestational carrier was to be accommodated in the residence of the candidate social parents throughout the gestational period.

Many decisions include references about the good financial situation of the candidate social mother, the harmonious relations between the candidate social parents and their income bracket.

Finally in 47/ 71 and 9/19 cases it was explicitly mentioned that the ova would be donated by the candidate social mother herself and in the rest of the cases by other donors.

In what concerns the study, it would be advantageous to have it continued, especially in large and perhaps middle-size courts of first instance definitely in Athens and Thessaloniki and, since we have data for the period spanning 2005-2009, it would be opportune to study the next 5 years.